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No. 87-261

In The

Supreme Court of the United States

October Term, 1987

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PACIFIC GAS AND ELECTRIC COMPANY,
a California Corporation,

Petitioner,

vs.

THOMAS TELLEZ,

Respondent.

———o———

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

———o———

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QUESTIONS PRESENTED

1. Should this Court review a ruling by the United States Court of Appeals for the Ninth Circuit that a union employee's state tort claims for defamation and infliction of emotional distress are not preempted by federal labor law when they do not arise from working conditions or collectively bargained grievance procedures?

2. Should this Court review a ruling by the United States Court of Appeals for the Ninth Circuit that a union employee's tort claims for defamation and intentional infliction of emotional distress were not preempted by federal labor law when they arose from the misrepresentations contained in a letter which was not mandated by the collective bargaining agreement and not part of the collectively bargained grievance procedure?

3. Should this court review a ruling by the United States Court of Appeals for the Ninth Circuit that the misrepresentations contained in a letter which was not contractually mandated and not part of the collectively bargained grievance procedure, are not absolutely privileged?

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Respondent Thomas Tellez respectfully prays that Petitioner Pacific Gas and Electric Company's petition for writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit entered on May 15, 1987, be denied.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 817 F.2d 536. This decision appears in Appendix A (App. 1) of Petitioner's brief. The order of the United States District Court for the Northern District of California granting PGandE's Motion for Summary Judgment is not published. It appears in Appendix B (App. 9) of Petitioner's brief.

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JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was issued on May 15, 1987. The petition for a writ of certiorari was filed within 90 days of that date. This response is filed within 30 days of the filing of the petition for a writ of certiorari. The Court's jurisdiction is invoked under Title 28 United States Code, section 1254 subdivision (1).

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 provides in relevant part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be

> brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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STATEMENT OF THE CASE

A. The Facts

Respondent Thomas Tellez has been employed by Petitioner PGandE since 1972, and is a member of Local 1245 of the International Brotherhood of Electrical Workers.

On December 12, 1983, during an investigation of drug use among employees at the Geysers facility, a "station helper" told the security department:

> On December 3, 1983 [employee #1] showed me a small package of white powder, which he told me was cocaine, which he was selling for $50.00 a packet. During the day, I saw [him] meet with [Tellez and two other employees]. They would walk off together and [employee #1] would return with the cash which he showed me. In the afternoon, [employee #1] told me that he had sold all of the cocaine and made $1,000.00.

On December 13, 1983, Tellez was questioned about drug or alcohol use on the job. He was not told about the station helper's statement. Tellez denied ever using drugs or alcohol on the job and heard nothing further, until December 29, 1983, when he was suspended for ten days, and received a letter from Richard S. Bain, manager of station construction. That letter said, in relevant part:

> You were observed to purchase cocaine from another employee at units 7 and 8. Although you denied this

> allegation during the December 13 interview, we are satisfied that the transaction did occur.
>
> (Petitioner's App. C., Exhibit A).

Bain sent copies of the letter containing this misrepresentation of the "eye witness" report to eleven other PGandE management employees. In a sworn declaration to the United States District Court, Northern District of California, Bain stated that he based this accusation on a review of the Security Department report containing the station helper's statement. (Petitioner's App. C). The declaration does not indicate that anyone else reviewed the report or drew the conclusions contained in the accusations of the December 29 letter, although the letter does stated that "*we* are satisfied that the transaction did occur." (emphasis added). The declaration also states that the letter was issued in accordance with the collective bargaining agreement between the Company and Mr. Tellez' union (Petitioner's App. C.), but a review of the collective bargaining agreement (Petitioner's App. D.) indicates that there is no requirement for written notice, nor does the agreement contain any procedures for imposition of discipline. The agreement begins with procedures for filing a grievance, once the disputed discipline has been imposed. (Petitioner's App. p. A23).

Tellez filed a timely grievance through his union, and nine months later a review panel ultimately concluded that PGandE had insufficient evidence for a just cause suspension. Tellez was awarded lost wages and interest and the letter was removed from his personnel file.

Within one year from the publication of Bain's letter, Tellez brought suit in state court, alleging breach of the

duty of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress and defamation. PGandE removed the action to Federal Court, and moved for summary judgment on the ground that Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185(a) preempted Tellez' state law claims. The District Court agreed and entered judgment on behalf of PGandE.

Tellez conceded preemption of his cause of action for breach of duty of good faith and fair dealing, because it would have required reference to the terms of the contract establishing the steps of the grievance procedure. However, he appealed the dismissal of his causes of action for defamation and intentional infliction of emotional distress because those claims are not based on the actual discipline imposed nor do they require reference to the terms of the collective bargaining agreement. On May 15, 1987, the Ninth Circuit Court of Appeals reversed the decision of the District Court, concluding that the defamatory statements were independent of any right established by the labor agreement and that the evaluation of the tort claims was not inextricably intertwined with consideration of the terms of the labor agreement. The Court of Appeals also found that since the letter was not mandated by the collective bargaining agreement, and the statements were not made within the course of grievance procedure, the letter was not absolutely privileged.

REASONS FOR DENYING CERTIORARI

A. The Ninth Circuit Properly Applied The Preemption Principles Adopted By This Court In Allis-Chalmers v. Lueck.

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) is the leading case interpreting Section 301 of the Labor-Management Relations Act. In that case, the Court held that the key to determining the preemption of state tort claims is consideration of whether the claims can be resolved only by referring to the terms of the collective bargaining agreement. *Id.* at 213. On the other hand, the Court noted that Section 301 does not preempt every dispute concerning employment, or tangentially involving a collective bargaining agreement. *Id.* at 211-12. Petitioner's argument that the Ninth Circuit Court of Appeals misapplied preemption principles to this case, fails on this very point. Consideration of the legal effect of Bain's misrepresentations does not require reference to the terms of the collective bargaining agreement.

The misrepresentations carry an impact of their own, completely separate from the suspension which was also imposed upon Tellez. The preemption doctrine is designed to assure a uniform standard for resolution of employment disputes. By making collective bargaining agreements susceptible to interpretation and enforcement by state law as well as federal law, that uniformity of standards is lost. However, the preemption doctrine need not be extended to every aspect of human interaction which may take place within the work environment. If consideration of state law rights does not require reference to the terms of the collective bargaining relationship and does not concern the

subject matter of working conditions or manner of imposing discipline, there is no danger of conflict between state and federal standards for collective bargaining agreements. Therefore, there is no reason to deprive an employee of his state law rights. To hold otherwise, as petitioner suggests, would be to turn employees involved in collectively bargained relationships into "second class citizens" with no access to the state-law rights afforded to other citizens.

1. Respondent's State Law Claim Of Defamation And Infliction Of Emotional Distress Are Non-Negotiable Rights.

In reversing the District Court's decision, the Court of Appeals held that California's defamation law establishes non-negotiable rights and obligations independent of any labor relationship. However, if consideration of those rights had required consideration of the terms of the collective bargaining agreement, they may have been preempted. In this case, the respondent's state tort claims do not in any way implicate the collective bargaining agreement.

Petitioner attempts to argue that under California Law, respondent Tellez consented to publication of the misrepresentations regarding his alleged job site drug deal, by his implicit consent to the terms of the contract. Petitioner's argument is specious. Clearly, if the collective bargaining agreement contains no reference to disciplinary letters, the respondent cannot have consented to the substance of the statements contained therein.

Petitioner further argues that the respondent consented to the publication of the misrepresentations contained in the letter, because even if the letter were not re-

quired under the terms of the agreement, letters of suspension were a matter of past practice. However, Petitioner has never offered evidence of a past practice, and raises that issue for the first time in this petition. Even the declaration of Richard S. Bain, (Petitioner's App. C) does not contain a reference to past practice. Furthermore, even if publication of such letters were a practice on the part of the employer, such practice would not refer to the terms of the collective bargaining agreement unless the publication and contents of disciplinary letters were the subject of an agreement between the employer and the union. Certainly, there could be no question of implied consent by respondent without such an agreement.

2. Respondent's Claims Are Not Inextricably Intertwined With The Labor Agreement, Nor Do They Interfere With The Central Role Of Arbitration In Federal Labor Law.

Petitioner seems to be arguing that because the collective bargaining agreement refers to discipline, every aspect of the manner in which such discipline is imposed should be preempted. Petitioner's argument misses the point of this case, because the Court of Appeals found that the respondent's tort claim did not arise from the discipline imposed in that same letter. Respondent's tort claims arise from the wholly gratuitous misrepresentations contained within the letter, and the extensive publication those statements received.

In this case, the employment relationship between Bain and Tellez is only relevant in that under California state law, taking advantage of a position of authority, such as that of employer over employee, may be an element of the outrageousness of the defendant's conduct. *Alcorn v. Anbro Engineering* (1970), 2 Cal.3d 493 at p. 498.

Petitioner turns to a recent California Supreme Court decision for support, but a careful review of that case shows it to be inapposite to the present case. In *DeTomaso v. Pan American World Airways, Inc.*, 43 Cal.3d 517 (1987), the Court found that the Railway Labor Act preempted the plaintiff's state tort claims for defamation and infliction of emotional distress because " . . . all these acts were inextricably intertwined with the inevstigation and discharge procedures mandated by the agreement. Indeed, all of the alleged wrongful conduct took place during the ordinary course of these proceedings." *Id.* at p. 530. In this case, however, the alleged wrongful conduct is limited to the character of the misrepresentations contained in the December 29 letter, and its extensive publication. Since the letter itself is not a product of the collective bargaining agreement, the wrongful conduct did not take place during the ordinary course of contractually mandated proceedings.

Petitioner further argues that because the Court of Appeals did not consider past practice in the publication of suspension letters, *no* complaint regarding working conditions or disciplinary formalities could be resolved through arbitration. Again, however, petitioner misses the point. A dispute regarding working conditions or disciplinary formalities could have been resolved through the contract. In this case, Bain's misrepresentations did not touch on working conditions or disciplinary formalities. *If* the suspension letter had been mandated by the contract, then consideration of its contents, even statements not touching on working conditions or disciplinary formalities, may have been privileged or preempted, because it may have required reference to the terms of the collective bar-

gaining agreement. However, we do not reach that point in this case. In this case, the letter was not contractually mandated and does not arise from any aspect of the agreement between the company and the union, even if the company should take it upon itself to put disciplinary letters in writing. Consequently, the standards by which the contents and publication of the letter are judged do not require reference to the collective bargaining agreement.

B. The Ninth Circuit Court of Appeals' Decision Does Not Conflict With Another Circuit Court's Decisions Regarding Privileged Statements.

Petitioner disputes the lower Court's holding that Bain's letter to Tellez was not absolutely privileged as part of the disciplinary process. However, the petitioner's reliance on *General Motors v. Mendicki*, 367 F.2d 66 (10th Cir. 1966) and *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981) is misplaced in this Petition, as it was in the proceedings before the Ninth Circuit Court of Appeals. That Court held that it was not necessary to consider the issue of absolute privilege in this case, because the statements from which Tellez' tort claims arise were not made in the course of employer/union discussions or proceedings. In this case, Bain's letter of December 29, 1983, emanated entirely from management and did not represent any combined effort on the part of the employer and the union to investigate or resolve the dispute.

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CONCLUSION

Limitations on state law rights should be very carefully imposed. When certain rights and remedies are negotiated into a collective bargaining agreement, when there is a danger of inconsistent state and federal interpretations of those rights and remedies, the courts are forced to impose some limitations in the interests of justice. However, it would go beyond the interests of justice to extend those limitations to deprive union members, subject to the terms and conditions of a collective bargaining agreement, of access to completely separate state law rights, consideration of which does not touch on the collective bargaining agreement.

Respectfully submitted,

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September 12, 1987